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# Brief for Laconic Baykeeper, Inc., Ima Fisher, Sam Schwimmer, Appellants/Cross-Appellees: Twentieth Annual Pace National Environmental Law Moot Court Competition

Alena Buitrago
*University of North Carolina School of Law*

Megan Bussey
*University of North Carolina School of Law*

Mindy Nunez
*University of North Carolina School of Law*

# MEASURING BRIEF*

Civ. App. No. 07-1001
Civ. App. No. 07-1002

**UNITED STATES COURT OF APPEALS**
**FOR THE TWELFTH CIRCUIT**

LACONIC BAYKEEPER, INC., IMA FISHER,
and SAM SCHWIMMER, Appellants—Cross-Appellees
v.
STEPHEN JOHNSON, ADMINISTRATOR,
U.S. Environmental Protection Agency,
Appellee—Cross Appellant.

NEW UNION FARMERS INSTITUTE, UNION OF NEW
UNION PESTICIDE APPLICATORS, HAPPY VALLEY FARM,
INC., and WICCILLUM COPTERS, INC., Appellants
v.
STEPHEN JOHNSON, ADMINISTRATOR,
U.S. Environmental Protection Agency,
Appellee—Cross Appellant.

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**ON APPEAL FROM THE UNITED STATES DISTRICT**
**COURT FOR THE DISTRICT OF NEW UNION**

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BRIEF FOR LACONIC BAYKEEPER, INC., IMA FISHER,
SAM SCHWIMMER, APPELLANTS/CROSS-APPELLEES

*University of North Carolina School of Law*
Alena Buitrago
Megan Bussey
Mindy Nunez

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## JURISDICTIONAL STATEMENT

This controversy presents federal questions arising under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (2000). The United States Court of Appeals for the Twelfth Circuit has jurisdiction over all claims on appeal in accordance with 28 U.S.C. § 1331 (2004) and the Administrative Procedure Act ("APA"), 5 U.S.C. § 704 (2000).

## STATEMENT OF THE ISSUES

1. Whether the environmental plaintiffs have standing to challenge the Pesticide Rule.

2. Whether the challenges to the Pesticide Rule should have been brought directly in the Court of Appeals pursuant to CWA § 509(b)(1), 33 U.S.C. §1369(b)(1) precluding District Court jurisdiction over any challenge to the Pesticide Rule.

3. Whether, if this Court determines these cases should have been commenced in the Court of Appeals, the Court should equitably toll the 120 day statute of limitations of the CWA §509(b)(1), 33 U.S.C. §1369(b)(1).

4. Whether Industry Petitioner's challenge is ripe under the doctrine of *Abbot Laboratories v. Gardner*.

5. Whether the Pesticide Rule's exemption of specified pesticide application activities from the CWA permitting program was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

6. Whether the failure of the Pesticide Rule to include within its exemption pesticide residues, pesticides applied in violation of FIFRA requirements, and pesticides applied distant from water but which drift into water was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

## STATEMENT OF THE CASE

Appellee Environmental Protection Agency ("EPA") issued Application of Pesticides to Waters of the United States in Compliance With FIFRA ("Pesticide Rule") on November 27, 2006. Application of Pesticides to Waters of the United States in Compliance With FIFRA, 71 Fed. Reg. 68,483 (Nov. 27, 2006). The Pesticide Rule adopts an amendment to 40 C.F.R. § 122.3 that creates an exemption to permitting requirements under section 402 of the CWA. The National Pollutant Discharge Elimination System, 40 C.F.R. § 122.3 (2004); Clean Water Act § 402, 33 U.S.C. § 1342 (2004).

Appellants Laconic Baykeeper Inc. ("LBK"), Ima Fisher, and Sam Schwimmer, ("environmental plaintiffs") commenced an action against the EPA in the United States District Court for the District of New Union. R. at 2. Environmental plaintiffs argued that the EPA does not have authority to adopt any exemption from the CWA permitting requirements for pesticides discharged into waters of the United States. *Id.* This case was consolidated

with Appellants New Union Farmers Institute, Union of New Union Pesticide Applicators, Happy Valley Farm Inc., and Wiccillum Copters, Inc., ("industry plaintiffs") who had commenced an action against the EPA, which challenged the limited scope of the exemption seeking a declaration that pesticide residues, pesticides applied in violation of FIFRA requirements, and pesticides applied distant from water but which drift into water should all be exempted from CWA permitting requirements. *Id.*

All parties moved for summary judgment. *Id.* The district court granted the environmental plaintiffs' motion for summary judgment in part, holding: (1) EPA acted contrary to the express intent of Congress when it purported to exempt biological (i.e. non-chemical) pesticides and non aquatic pesticides applied over or near water from CWA permitting requirements, and (2) industry plaintiffs' challenges were not ripe under *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). *Id.*

Environmental and industry plaintiffs both appealed and EPA cross-appealed in both cases. This court certified six issues for review. R. at 2-3.

## STATEMENT OF THE FACTS

Plaintiffs are Laconic Baykeeper, Ima Fisher and Sam Schwimmer. LBK, a not for profit environmental organization, is comprised of members who are both recreational and commercial users of Laconic Bay, a body of water connected to the Laconic Ocean. R. at 5. Ima Fisher, a third generation commercial fisherperson and member of LBK uses and depends on Laconic Bay for her livelihood. It is for this reason that Fisher is concerned that the mosquito control pesticides used in the salt marshes surrounding the bay will severely affect the marine life and result in the death of fish and reduction of finish and crabs. *Id.* Sam Schwimmer is a recreational user of Laconic Bay. *Id.* While he does not depend on the bay to provide for his livelihood, he is concerned that the use of pesticides around Laconic Bay will expose him to dangerous chemicals when he swims in Laconic Bay. Furthermore, as an avid birdwatcher, he is concerned that the chemicals will reduce his ability to bird watch. *Id.* Both Ima Fisher and Sam Schwimmer have formally submitted their environmental concerns in the form of affidavits which have not been refuted either by the EPA or by industry plaintiffs. R. at 9.

Furthermore, while there have yet to be any reported human cases of the West Nile Virus within the State of New Union, the

City of Progress Health Department has nonetheless developed a "Mosquito Control Plan" to implement if and when such a problem should arise. R. at 6. As part of their plan, the city plans on using a mosquito larvicide known as BTI to salt marshes adjacent to Laconic Bay. *Id.* In addition, the city plans on using a chemical adulticide, known as "Anvil 10 + 10," directly over Laconic Bay. *Id.*

Although the City of Progress has not yet applied either the BTI larvicide or Anvil 10 + 10 adulticide, they plan on "shortly commencing" such operations which will have detrimental environmental effects on the Bay. R. at 9. The environmental plaintiffs have documented the adverse affects on bodies of water in cities which have already commenced a Mosquito Control Plan. The application of Anvil 10 +10 in 2002 resulted in the death of thousands of fish in freshwater lakes. In addition, the East Coast has recently experienced a declining crab population as the use of Anvil 10 + 10 in their salt marshes has interfered with the accelerated sexual maturity and reproduction of female crabs. Not only would such a decline in reproduction be detrimental to the environment, but a decline in crab population and fish in lakes would lead to severe economic loss for those who depend on such marine life as a form of economic stability, including Ima Fisher.

Furthermore, the application of such larvicides and adulticides without the requisite permits has raised doubts as to the legality of such actions. According to the CWA, in order to discharge any pollutant into waters, one first needs to obtain a permit from the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. §§ 1311(a), 1342(a) (2004). Such a permit is required whenever one: 1) discharges, 2) a pollutant, 3) to navigable waters 4) from a point source. R. at 7 (*citing Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993)).

Responding to confusion over whether or not there was a need for a permit under the CWA, the EPA issued several statements. Most notably, in 2003, the EPA expressed their view that "pesticide applications *directly to water*, and applications *directly over water*, are not the discharge of 'pollutants' so long as they are done in compliance with relevant FIFRA requirements, including label instructions." R. at 6. (citing 68 Fed. Reg. 48,385 (Aug. 13, 2003)). In addition, in 2005 the EPA issued a final guidance document[1] and in 2007 issued the Pesticide Rule. Application of Pesticides to

1. 70 Fed. Reg. 5093 (Feb. 1, 2005).

Waters of the United States in Compliance With FIFRA, 71 Fed. Reg. at 68,483. The Pesticide Rule amends 40 C.F.R. §122.3 and exempts from the CWA's permitting requirements, two categories of pesticides: those applied directly to water to control pests in the water and those applied over or near water to control pests over or near water, provided that they comply with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). *Id.*

On February 23, 2007, environmental plaintiffs commended this action in order to challenge the EPA's authority to adopt such exemptions from the permitting requirements. R. at 7. Since commencing this action on February 23, 2007, plaintiffs became aware of the intent of the City of Progress to soon commence larviciding and adulticiding according to their Mosquito Control plan. *Id.*

## SUMMARY OF THE ARGUMENT

Each of the environmental plaintiffs has standing in this action b/c they satisfy the requisite constitutional, prudential, and associational standing requirements. Plaintiffs Ima Fisher and Sam Schwimmer demonstrate through affidavits that the Pesticide Rule will interfere with their current ability to use Laconic Bay commercially and recreationally. Such an interference constitutes an injury sufficient to satisfy the constitutional standing requirement, because it is: (1) an "injury in fact," (2) causally related to the Pesticide Rule, and (3) redressable by a favorable ruling from this Court. Ima Fisher and Sam Schwimmer satisfy the prudential standing requirements, because the interests that they seek to protect are within the zone of interests regulated by the CWA and their injury is not general to all citizens. Laconic Baykeeper has standing in this action under the associational standing doctrine because: (1) its individual members have standing, (2) the interests it seeks to protect are germane to its purpose, and (3) its claim and requested relief do not require participation by individual members.

The district court correctly determined that it had jurisdiction to review the Pesticide Rule. Since, the Pesticide Rule cannot be considered to constitute an "effluent limitation or other limitation" or the issuing of a permit, section 509(b)(1) of the Clean Water Act requiring exclusive jurisdiction in the Court of Appeals is inapplicable, and jurisdiction in the district court was proper. 33 U.S.C. §1369(b)(1). Furthermore, district court review was proper, because there was neither statutory ambiguity over jurisdiction nor

congressional authority to take judicial efficiency into consideration.

Even if this Court finds that the action should have been originally adjudicated in the Court of Appeals pursuant to section 509(b)(1), this Court should equitably toll the one hundred twenty day statute of limitations in favor of plaintiffs. Equitable tolling is proper in this case since the plaintiffs exercised due diligence and equitable tolling will not result in harm to the defendant.

The industry plaintiffs' claim—EPA's failure to expand the Pesticide Rule was arbitrary and capricious and not in accordance with law—is ripe under the doctrine under *Abbot Laboratories v. Gardner*, because their claims were fit for judicial review, and they would suffer hardship if the court withheld consideration. First, the claim is fit for judicial review because it raises is purely legal issue, consideration of the issue would benefit from a more concrete setting, the Pesticide Rule is a final agency action. Second, the industry plaintiffs would suffer hardship if the court withheld consideration because they would be vulnerable to citizen suits under the CWA, and would be forced to either go through the expensive and time consuming process of applying for NPDES permits or face potential civil liability.

Since the Clean Water Act expressly prohibits the discharge of any pollutant absent a NPDES permit, EPA's adoption of the Pesticide Rule which allows the discharge of chemical and biological pesticides into water absent a permit is directly contrary to Congressional intent, and therefore, not in accordance with law. Even if this Court finds that Congress has not spoken directly to the issue of whether pesticides are "pollutants" under the CWA, EPA's adoption of the Pesticide Rule is not in accordance with law because it is an impermissible construction of the CWA.

The industry plaintiffs' assertion that EPA's failure to include within the Pesticide Rule pesticides applied in violation of FIFRA and pesticides applied distant from water, but which drift into water is without merit. Since the current Pesticide Rule is not in accordance with law, and any extension of the rule is likewise not in accordance with law. Even if this Court concludes that the Pesticide Rule is in accordance with law, EPA's declination to extend the rule is proper since it is a well established principle of Administrative Law that inaction by an agency is afforded a high level of deference.

## STANDARD OF REVIEW

The grant or denial of summary judgment is reviewed de novo, applying the same standard as the district court. *Williams v. Mo. Dept. of Mental Health*, 407 F.3d 972, 975 (8th Cir. 2005). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

## ARGUMENT

### I. Environmental Plaintiffs Satisfy Article III's Standing Requirements In Their Challenge Of The EPA's Regulatory Action

Plaintiffs Ima Fisher and Sam Schwimmer each satisfy both the constitutional and prudential requirements for standing. Plaintiff Laconic Baykeeper, acting on behalf of its members, including Ima Fisher and Sam Schwimmer, has associational standing in this action. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("Even in the absence of injury to itself, an association may have standing solely as the representative of its members").

The constitutional standing requirement grounded in Article III is satisfied if the plaintiff demonstrates: (1) an "injury in fact" that is either actual or imminent; (2) the injury is causally related to the action challenged; and (3) the injury is subject to redress by the Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The prudential standing requirement imposed by the judiciary is satisfied if the plaintiff demonstrates: (1) the injury is within the zone of interests protected or regulated by the provision being challenged, and (2) the injury is not shared by all citizens. *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479 (1998). Each environmental plaintiff meets the appropriate standing requirements.

## A. Constitutional Standing

### 1. Ima Fisher and Sam Schwimmer have established that they have suffered an "injury in fact."

The district court properly determined that Ima Fisher and Sam Schwimmer satisfied the 'injury in fact' requirement by showing respectively that their personal enjoyment and economic benefits would be abrogated if the Pesticide Rule was upheld. "In environmental cases, the injury in fact requirement is met if an individual member adequately shows that she or he has an economic, aesthetic, or recreational interest in a particular place, animal, or plant species and that the interest is impaired by the challenged conduct." *National Resources Defense Council v. EPA.*, 437 F.Supp.2d 1137 (C.D. Cal. 2006). Further, Ima Fisher and Sam Schwimmer demonstrate, through specific facts set forth in their affidavits, that their injury is both concrete and particularized and imminent. *See generally Defenders of Wildlife*, 504 U.S. at 560.

Ima Fisher, in her affidavit, describes her use of Laconic Bay as a third generation fisherperson. She states that should mosquito control pesticides be discharged into the lake and its adjacent marshlands, she would suffer economic injury because the pesticides would kill and reduce the reproductive success of some fish and crabs, the quantity of which she relies on for the success of her business. Such economic harm has long been recognized by the courts as a sufficient demonstration of concrete and particularized injury. *See Adams v. Watson*, 10 F.3d 915 (1st Cir. 1993) (Milk producers sufficiently alleged particularized future economic injury to support standing to challenge constitutionality of milk pricing order.); *National Rifle Ass'n of America v. Magaw*, 132 F.3d 272 (6th Cir. 1997) (Gun manufacturers and dealers had standing to challenge the Crime Control Act because compliance with the Act would have caused them immediate economic harm); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968) (Power company had standing, because they suffered a competitive economic injury).

Plaintiff Sam Schwimmer is a recreational user of Laconic Bay and states that he uses the Bay and its adjacent marshlands for swimming and bird watching. His affidavit states that should the pesticides be discharged into the lake and adjacent marshlands he would be less likely to swim there, because of fear that he will be exposed to harmful chemicals. He also states that his bird

watching may be diminished, because the chemicals would kill the birds. While Schwimmer is not alleging any economic harm, "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity.'" *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (Standing is not confined to those who show economic harm, since aesthetic and environmental well-being, like economic well-being, are important ingredients of quality of life in our society.); *see also Defenders of Wildlife,* 504 U.S. at 562-563 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.") Thus, Schwimmer, thru his affidavits, has established that the challenged action would cause him to suffer a concrete and particularized injury.

The "injury in fact" established by plaintiffs is imminent. While no pesticides have actually been discharged into the water, the impeding harm described in plaintiffs' affidavits satisfies the imminence requirement.

> Although imminence "is concededly a somewhat elastic concept, [its purpose] is to ensure that the injury is not too speculative for Article III purposes-that the injury is certainly impending." Therefore, while an allegation of possible future injury does not satisfy the requirements of Article III, an allegation of threatened injury that is "certainly impending" does constitute injury in fact, and does meet the constitutional threshold.

*National Air Traffic Controllers Ass'n, MEBA, AFL-CIO v. Pena*, 944 F.Supp. 1337 (N.D. Ohio 1996) (quoting *Defenders of Wildlife,* 504 U.S. at 565 n. 2); *see also Whitmore,* 495 U.S. at 158; *Brunet v. City of Columbus,* 1 F.3d 390, 396 (6th Cir. 1993), *cert. denied,* 510 U.S. 1164 (1994). "Plaintiffs need not wait until the city has actually caused harm to Laconic Bay before challenging the regulatory scheme under which the City claims a right to act" R. at 9 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982) (A "threatened injury" will satisfy the "injury in fact" requirement for standing), *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1987) (In a citizen suit under the Clean Water Act, the Court proceeded on the issue of whether the district court should have enjoined continued oper-

ations pending receipt of an NPDES permit, even though the district court found no harm to the waterway.) *See Village of Elk Grove Village v. Evans,* 997 F.2d 328, 329 (7th Cir. 1993) (finding standing because "the Village is in the path of a potential flood" and "even a small probability of injury is sufficient to create a case or controversy.").

EPA and the Industry Plaintiffs may attempt disprove imminence by likening this case to *Defenders of Wildlife*. Such an attempt is without merit. In *Defenders of Wildlife,* the Court found that affidavits stating that plaintiffs previously traveled to places in the world to observe endangered species and that the plaintiffs hoped to one day return and observe endangered species in those locations did not show that damage to species from the challenged action would produce imminent injury to them. *Defenders of Wildlife,* 504 U.S. 555. In this case, the plaintiffs' affidavits allege injury to actions that the plaintiffs engage in on a daily basis at a body of water in close proximity to them. Such injury is not comparable to the "'some day' intentions" to visit endangered species that were found insufficient in *Defenders of Wildlife.*

In addition, because birds and mosquitoes have recently been found to be infected with West Nile Virus in the vicinity of Laconic Bay and the City of New Union will soon implement their Mosquito Control Plan, the harm to the plaintiffs imminent now more than ever.

### 2. Ima Fisher and Sam Schwimmer have established that the injury is causally related to the action challenged.

The plaintiffs' injuries identified above are sufficiently casually related to EPA's promulgation of the Pesticide Rule to establish standing. "In order to demonstrate that they are more than concerned bystanders, plaintiffs need only show that there is a substantial likelihood that defendant's conduct caused plaintiffs harm." *Public Interest Group v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3rd Cir. 1990) (internal quotations omitted); *see also Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59 (1978) (finding that causation requirement for standing can be satisfied absent direct proof of injury.); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996) (holding that relying on circumstantial evidence in determining causation is appropriate given that the "threshold for injury requirement is fairly low.")

The environmental plaintiffs' affidavits, which set forth the harm caused by the use of aquatic pesticides in other lakes and salt marshes, establishes a "substantial likelihood" that Pesticide Rule will cause similar harm to Laconic Bay. Particularly, the affidavits claim that the active ingredient in the aquatic pesticide which the City plans to use has been shown to cause the die-off of freshwater fish and the declination of crab populations. R. at 6. Furthermore, the general concern that exposure to chemicals in Laconic Bay will have negative health effects on recreational users of Laconic Bay, including Sam Schwimmer, is sufficient to establish the requisite causation for standing. *See Duke Power Co.*, 438 U.S. at 74 (plaintiffs who lived near a nuclear power plant had standing since "the emission of non-natural radiation into appellees' environment would also seem a direct and present injury, given our generalized concern about exposure to radiation"); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d at 557-558 (plaintiffs who asserted that discharge of pollutants in Galveston Bay would lessen their enjoyment of the bay had standing even though they failed to produce any direct scientific or visual evidence of harm to the water). The plaintiffs' affidavits demonstrating their concern about the pollution of Laconic Bay's water with toxins, is sufficiently causally related to the EPA's rulemaking as to satisfy the 'injury in fact' requirement.

### 3. Ima Fisher and Sam Schwimmer have established that the injury is subject to redress by the court.

The environmental plaintiffs' injuries will be redressed by a favorable decision by this Court. The redressibility requirement of standing, "examines the causal connection between the alleged injury and the judicial relief requested." *Allen v. Wright,* 468 U.S. 737, 753 n. 19 (1984). Should EPA's rulemaking be found invalid, the City's Mosquito Control Plan would not longer be allowed to dump pollutants directly into Laconic Bay and its surrounding wetlands. Instead, they would be subject to the CWA's permitting requirements.

> The purpose of the Act is to restore the chemical, physical and biological integrity of the nation's waters. Where a plaintiff complains of harm to water quality because a defendant exceeded its permit limits, an injunction will redress that injury at least in part . . . Plaintiffs need not show that the waterway will be

> returned to pristine condition in order to satisfy the minimal requirements of Article III.

*Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 73 (3rd Cir. 1990). Similarly, requiring a NPDES permit for the discharge of aquatic pesticides will redress the environmental plaintiffs' injuries which are caused by the unregulated discharge of pollutants under the Clean Water Act. Furthermore, the environmental plaintiffs do not need to prove that the Laconic Bay will remain in its current condition if the Pesticide Rule is struck down and aquatic pesticides are discharged into the bay pursuant to a NPDES permit. The NPDES permit will ensure a certain level of water quality in the bay that will not be ensured if no permit is required.

## B. Prudential Standing

Ima Fisher and Sam Schwimmer satisfy the prudential standing requirements, because the interests that they seek to protect are within the zone of interests regulated by the CWA and their injury is not general to all citizens. "In addition to the immutable requirements of Article III, "the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing."[2] *Mudd v. White*, 309 F.3d 819, 824 (D.C. Cir. 2002).

"Prudential standing exists if the interest that the plaintiff seeks to protect is "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Courtney v. Smith*, 297 F.3d 455 (6th Cir. 2002) (ellipsis in original) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153 (1970)). Ima Fisher and Sam Schwimmer's interest in protecting the integrity and water quality of Laconic Bay in order to ensure their continued economic and recreational use of the Bay is within the zone of interest protected by the Clean Water Act. *See Puerto Rico Campers' Ass'n. v. Puerto Rico Aqueduct and Sewer Authority*, 219 F.Supp.2d 201 (D.P.R.2002) Action by campers association seeking to enforce NPDES permit requirements for waste water treatment plant fell within zone of interests of Clean Water Act); *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251

2. Section 10(a) of the Administrative Procedure Act (APA) permits injured parties to obtain judicial review of agency actions that allegedly violate federal statutes . . . A plaintiff seeking judicial review of agency action under the APA, however, must not only meet the constitutional requirements of standing, but must also demonstrate prudential standing. *Courtney v. Smith*, 297 F.3d 455 (2002) 460-461.

(D.C. Cir. 2004) (Action by environmental organization challenging EPA's standards for radiation exposure was within the zone of interests protected by the Energy Policy Act, which seeks to ensure the safe operation of nuclear power plants).

Furthermore, prudential standing requires that, "a plaintiff's claim must be more than a 'generalized grievance' that is pervasively shared by a large class of citizens." *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.,* 454 U.S. 464, 474-75 (1982); *see Nat'l Fed'n of Fed. Employees v. Cheney,* 883 F.2d 1038, 1047 (D.C. Cir.1989). However, "to deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." *U.S. v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669, 688.

The injury suffered by Ima Fisher is specific to her business as a commercial fisherwoman who fishes in Laconic Bay. The injury suffered by Sam Schwimmer is specific to his status as a recreational swimmer and birdwatcher in and near Laconic Bay. Such injuries are not shared by all citizens and are not comparable to injuries found by the courts to be too generalized to confer standing upon the plaintiffs. *Compare Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (being deprived of fair and constitutional use of tax dollars is too general to meet prudential standing requirements) with *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (interests of consumers affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides not too generalized to confer standing).

### C. Laconic Baykeeper, Inc. has associational standing on behalf of Ima Fisher and Sam Schwimmer.

> Even if the organization has not suffered injury to itself, it may have standing to assert the rights of its members if (1) its members would have standing to sue on their own; (2) the interests it seeks to protect are germane to its purpose, and (3) its claim and requested relief do not require participation by individual members.

*Salmon v. Pacific Lumber Co.*, 30 F.Supp.2d 1231, 1238 (N.D. Cal. 1998) (citing *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333 (1977)).

As discussed above, two of Laconic Baykeers' members, Ima Fisher and Sam Schwimmer, have standing in this action. *See supra* pp. 7-14. Furthermore, since the claim does not require the participation of Laconic Baykeepers' individual members, only the germaneness requirement is left to discuss.

Laconic Baykeepers satisfies the germaneness requirement for associational standing. "It remains only to note that in thus characterizing the germaneness requirement as mandating mere pertinence between litigation subject and organizational purpose, we join a number of other courts which, without any detailed analysis of prong two, have declared it undemanding." *Humane Soc. of the U.S. v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988) (citing *National Constructors Association v. National Electrical Contractors Association,* 498 F.Supp. 510, 521 (D. Md.1980) (defining germaneness standard as allowing suits by groups whose purposes are "pertinent or relevant to" claim at issue); *American Insurance Association v. Selby,* 624 F.Supp. 267, 271 (D.D.C. 1985) (stating that "an association's litigation interests must be truly unrelated to its organizational interests before a court will declare that those interests are not germane"); *Medical Association of Alabama v. Schweiker,* 554 F.Supp. 955, 965 (M.D. Ala.1983) (stating that germaneness test requires that "the injury to [an association's] members has some reasonable connection with the reason the members joined the organization and with the objectives of the organization")).

Laconic Baykeepers is a non-profit environmental organization whose members are various recreational and commercial users of Laconic Bay. The members have a common interest in protecting the water quality in Laconic Bay.

> The doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others. "The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all."

*Salmon*, 30 F.Supp.2d at 1240 (quoting *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 187 (1951) (Jackson, J., concurring). Thus, the interests that Laconic Baykeepers seeks to protect—the water quality of Laconic Bay—is germane to its pur-

pose of ensuring the continued recreational and environmental use of the bay for its members. *See Human Soc. of the U.S.*, 840 F.2d 45 (holding that goals sought to be served by animal protection organization in bringing suit challenging Fish and Wildlife Service's expansion of hunting in wildlife refuges were pertinent to the organization's purposes, so that it had standing to sue as an organization.).

## II. Jurisdiction in the District Court was Proper

The district court correctly determined that it had jurisdiction to review the Pesticide Rule. Defendants claim that the challenges to the Pesticide Rule should have been brought directly in the Court of Appeals pursuant to section 509(b)(1) of the CWA. R. at 9. Specifically, EPA argues that at issue here is an action that concerns an "effluent limitation or other limitation" under section 509(b)(1)(E), or an action "issuing or denying a permit" under section § 509(b)(1)(F). *Id.* As such, the EPA claims that review falls under the specific jurisdiction of the Court of Appeals. However, this claim must fail because the Pesticide Rule cannot be considered to constitute an "effluent limitation or other limitation" or the issuing of a permit, and jurisdiction in the district court was proper. See *Northwest Environmental Advocates, et al, v. EPA*, 2005 WL 756614 (N.D.Cal. 2005) (finding that a review of identical exemptions under the CWA regulations was proper in the District Court.)

### A. The regulations at issue do not constitute an "effluent limitation or other limitation."

First, Pesticide Rule does not constitute an "effluent *limitation* or other *limitation*" as provided for under section 509(b)(1)(E) of the CWA. 33. U.S.C. § 1369(b)(1)(E) (emphasis added). The Pesticide Rule does not provide any limitations upon the actions of individuals. On the contrary, it eliminates previous limitations that were in place, and therefore, does not rise to the requisite level to constitute an "effluent limitation."

> The regulations entirely exempting certain kinds of pesticide application from the NPDES permit program cannot in any sense of the word be considered an "effluent limitation or other limitation." Far from limiting anything, the regulations in question are permissive and remove specified pesticide activities from the limitations of CWA.

R. at 9.

Since the Pesticide Rule does not concern an "effluent limitation," EPA argues that it can be considered to constitute "other limitations" and thus render jurisdictional review in the Court of Appeals proper section 509(b)(1)(E). R. at 9. Specifically, EPA turns to cases in which the court reviewed the regulations that expanded the scope of the NPDES permitting requirements and argues that the regulations in those cases were subject to direct review under section 509 of the CWA. *See Envtl. Def. Ctr. V. EPA*, 344 F.3d 832 (9th Cir. 2003); *Am. Mining Cong. v. EPA*, 965 F.2d 759 (9th Cir. 1992). While it is true that both of the cases cited by the EPA required review under the section 509, EPA fails to make key distinctions between the cases cited and the case at hand. Specifically, the EPA fails to recognize that the issue is both cases involved expanding the scope of permitting activities. "[O]bviously, regulations that expand the scope of permitting activities and define the procedures for obtaining permits are very different from a regulation providing an exemption from permitting entirely." R. at 10. Therefore, while direct review to the Court of Appeals may be necessary in cases which serve to expand the scope of activities in order to obtain a permit, no such direct review is necessary for the Pesticide Rule, because it eliminates the need for a permit altogether.

### B. The regulations at issue do not constitute the "issuing or denying of a permit."

Second, the regulations at issue do not constitute the "issuing or denying of a permit" under section 509(b)(1)(F) of the CWA. 33 U.S.C. § 1369(b)(1)(F). In order to be considered a permit, there would need to be conditions and limitations in place specifically designed to meet water quality standards. 33 U.S.C. §§ 1342(a), 1311(b), 1312(a). The regulations in question contain neither conditions nor limitations designed to meet water quality standards. In fact, the regulations mention nothing about meeting or even maintaining water quality standards, but focus instead upon what can be introduced into water sources.

The effect of the Pesticide Rule is actually opposite to the issuing or denying of a permit. "[T]he Pesticide Rule can hardly be considered an action "issuing or denying a permit" as the effect of the Pesticide Rule is to remove the specified activities from the permitting program entirely." R. at 9. Therefore, the regulations

cannot be seen as the issuing or denying of a permit as the EPA argues, and review under the District Court was proper.

### C. District court review was proper because there was neither statutory ambiguity over jurisdiction nor any congressional authority to take judicial efficiency into consideration.

#### 1. District Court Review was proper as there was no statutory ambiguity over which court had jurisdiction.

EPA further argues that whenever there is an ambiguity as to which court is to grant judicial review, the ambiguity is to be resolved in favor of the Court of Appeals, however, the district court was correct in finding "no ambiguity in the language of the CWA § 509(b)(1)." R. at 10. In support of its claim, EPA cites *Tennessee v. Herrington,* 806 F.2d 642, 650 (6th Cir. 1986) and *Suburban O'Hare Comm'n v. Dole,* 787 F.2d 186, 192 (7th Cir. 1986) and concludes that judicial review would have been proper with the Court of Appeals and not the District Court. This argument however, fails to take into consideration the necessary element of an "ambiguity." In the case at hand, there is no ambiguity as to where jurisdiction lies. Since there is neither an "effluent limitation or other limitation" nor is there the "issuing or denying [of] a permit", there is no reason that the Court of Appeals would have exclusive jurisdiction.

#### 2. Judicial efficiency argument flawed.

EPA further argues that jurisdiction laid with the Court of Appeals for judicial efficiency's sake. According to EPA, judicial efficiency would have been served by having a single review in a Court of Appeals rather than possible multiple reviews in the district court. While judicial efficiency may have been served, "These arguments should be addressed to Congress, not to this Court, as the language of section § 509(b)(1) simply cannot be stretched to include a regulatory exclusion within the ambit of either a 'limitation or an 'approval or denial of a permit.'" R. at 10. Had Congress deemed judicial efficiency important enough to warrant direct review to a Court of Appeals, they would have made their intent clear when drafting the Clean Water Act. EPA is without authority to argue judicial efficiency, and such an argument has no bearing on jurisdiction.

## III. The Court Should Equitably Toll The 120 Day Statute Of Limitations Of The CWA § 509(B)(1).

Should this court disagree with the district court and interpret the terms of the Clean Water Act to require automatic review to the Court of Appeals, then this court should equitably toll the one hundred twenty day statute of limitations in favor of environmental plaintiffs.

### A. Plaintiffs exercised due diligence

The plaintiffs exercised due diligence in commencing this action in the district court. The tolling of a statute of limitations is generally applicable when a plaintiff has timely filed suit in an improper forum, but otherwise exercised due diligence. *See Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965). The statute of limitations should be tolled if this court finds that action was timely filed in the wrong court. *See Burnett,* 380 U.S. 424 (statute of limitations tolled where the plaintiff timely filed his action in state court which was later dismissed for improper venue.). In *Burnett*, even though the statute of limitations had run prior to the filing in federal court, the state court's dismissal for improper venue tolled the statute and allowed petitioners to timely file appeal in federal court. *Id.* Similarly, since environmental plaintiffs timely filed this action in federal district court, if this court finds that the district court was an improper venue, the statue of limitations should toll in favor of the environmental plaintiffs.

### B. Equitable tolling will result in no harm to the defendants

The statute of limitations should toll in favor of the environmental plaintiffs since the EPA had adequate notice of the litigation. "The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one 'of legislative intent whether the right shall be enforceable . . . after the prescribed time.'" *Burnet,* 380 U.S. at 426. In considering such legislative intent, the Court focused on the underlying policy rational for enforcing statute of limitations, namely the unjust effect of not giving the defendant adequate notice.[3] *See Rail-*

3. In reference to the statute of limitations, the CWA states that "[a]ny such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, *or after such date* only if such application is

*road Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944). In *Burnett,* the statute of limitations tolled since the filing of the action in state court placed the defendants on proper notice and gave them adequate time to prepare. Similarly, in the case at hand, the EPA was not only on notice, but was actually in the process of litigating the same matter before a District Court. In addition, since the District Court ruled that there was jurisdiction to hear the case, the EPA was on full notice that litigation was pending and imminent.

## IV. The Industry Petitions' Challenge is Ripe Under the Doctrine of Abbot Laboratories v. Gardner.

The district court erred in finding that the industry plaintiffs' claims were not ripe for judicial review. R. 10. The ripeness inquiry under the doctrine *Abbot Laboratories v. Gardener* is two-fold, and requires the court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149 (1967). In order for their claims to be ripe, it is not necessary for this Court to find that the industry plaintiffs satisfy both of the Abbott considerations. Instead, "if the court 'ha[s] doubts about the fitness of the issue

for judicial resolution,' it will 'balance the institutional interests in postponing review against the hardship to the parties that will result from delay.'" and where "there are no significant agency or judicial interests militating in favor of delay, [lack of] hardship cannot tip the balance against judicial review." *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 440 F.3d 459, 465 (2006) (quoting *Nat'l Mining Ass'n v. Fowler,* 324 F.3d 752, 756 (D.C. Cir. 2003)). The industry plaintiffs' challenge to the Pesticide Rule does, however, satisfy both of the Abbott considerations and is sufficiently ripe.

### A. The industry plaintiffs' challenge to the Pesticide Rule is fit for judicial decision.

"In determining the fitness of an issue for judicial review we look to see whether the issue 'is purely legal, whether considera-

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based solely on grounds which arose after such 120th day." CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1). The term "or after such date" indicates that Congress had the intent to allow a plaintiff to file a claim, after the statutory period has run, if the grounds on which the claim is based arose after the 120 period.

tion of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final.'" *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998) (internal quotations omitted).

### 1. The issue is purely legal

The issue raised by the industry plaintiffs—whether EPA's failure to broaden the Pesticide Rule is arbitrary and capricious or not in accordance with law—is a purely legal issue. *Sprint v. F.C.C.*, 331 F.3d 952, 956 (D.C. Cir. 2003) (the question of whether an agency decision is arbitrary and capricious is a "purely legal question"); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1039 (D.C. Cir. 2002) (challenge to rule as contrary to statute presented pure question of law). Purely legal questions are presumptively reviewable. *National Min. Ass'n v. Fowler*, 324 F.3d 752, 757 (2003).

### 2. Consideration of the issue would benefit from a more concrete setting

EPA's Pesticide Rule states that pesticide applications directly to water and directly over water are not the discharge of "pollutants" if they are applied in compliance with the FIFRA. However it remains unclear if the application of aerial pesticides that may drift and end up in surface waters is a discharge of a "pollutant" as defined in the CWA, thus requiring a NPDES permit. Judicial consideration of the industry plaintiffs' claim will crystallize the Pesticide Rule.

The district court erroneously determined that, "[i]ndustry plaintiffs' challenge is not fit for judicial review as the question of whether particular terrestrial applications of pesticides involve discharges into water is highly fact bound." R. at 10. In *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 440 F.3d 459 (2006), the D.C. Circuit, in reviewing a similar ripeness issue, rejected this reasoning stating that it "does not support postponing review for lack of ripeness." *National Ass'n of Home Builders*, 440 F.3d 459 (2006). There the industry plaintiffs challenged EPA's promulgation of the Tulloch Rule which defined the "discharge" of dredged material under the CWA. *Id.* The District Court found that the industry plaintiffs' challenge was not ripe because of the fact-specific nature in determining what is regulable discharge. 311 F.Supp.2d 91, 98 (D.D.C. 2004). The Court of Appeals reversed the district court's finding holding that "[w]hile

the final determination of whether to require a permit in a given case will, as is usual in an agency adjudication, rest on case-specific findings, this fact does not diminish the fitness of 'Tulloch II' for review." *National Ass'n of Home Builders*, 440 F.3d 459, 464. Likewise, this court should find that despite the fact-specific nature of whether the application of certain pesticides requires a NPDES permit, the industry plaintiffs' challenge of the Pesticide Rule is reviewable.

### 3. The agency's action is sufficiently final

Finality is satisfied, because the Pesticide Rule was published as a final rule in the Federal Register after notice and comment. Application of Pesticides to Waters of the United States in Compliance With FIFRA, 71 Fed. Reg. 68,483.

## B. The industry plaintiffs will suffer hardship if the court withholds consideration.

The district court found that there is not hardship to the industry plaintiffs in deferring review because, "[n]one of the industry plaintiffs have been subject to enforcement for their activities, and no such enforcement has been threatened." R. at 11." The district court is mistaken. Even if the industry plaintiffs don't face enforcement by EPA, after the promulgation of the Pesticide Rule, they are vulnerable to citizen suits involving pesticide discharges that are not exempt by the rule, namely the application of certain pesticides that drift into water and the application of pesticides that do not comply with FIFRA. *See No Spray Coalition v. City of New York*, 351 F.3d 602 (2d Cir. 2003) (CWA authorizes any citizen to bring suit to enforce its requirements, regardless of whether the claimed CWA violation also violated FIFRA). In addition, even if the industry plaintiffs prevailed in such a case, the cost of litigating alone is a significant hardship.

The Court in *National Ass'n of Home Builders* found hardship to the plaintiffs since they "face[d] the choice of applying for a permit for activities Industry claims are outside the scope of the Corps' and EPA's authority under section 404 or face civil or criminal enforcement penalties for failing to do so." *Id.* at 465. *See also Abbott Laboratories v. Gardner,* (1967) 387 U.S. 136 (hardship requirement was satisfied in pre-enforcement action for declaratory judgment, because the affected companies either had to expend substantial amounts of money to comply with the regulations or not comply and risk serious criminal and civil penalties); *National*

*Rifle Ass'n of America v. Magaw* (Firearm manufacturers and dealers' declaratory judgment action challenging portions of Crime Control Act on equal protection and commerce clause grounds was fit for judicial review, even though no prosecution was pending). Similarly each industry plaintiff faces the choice of either applying for a NPDES permit for pesticide applications outside of the scope of the Pesticide Rule or facing civil penalties

## V. The Pesticide Rule's Exemption of Certain Pesticide Applications From the Clean Air Act's Permitting Program is Not in Accordance With the Law

Since the Clean Water Act expressly prohibits the discharge of any pollutant absent a NPDES permit, EPA's adoption of the Pesticide Rule which allows the discharge of chemical and biological pesticides into water absent a permit is directly contrary to Congressional intent, and therefore, not in accordance with law. This Court "shall . . . hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act §706(2)(A), 5 U.S.C. §555 (2000). In order to determine if EPA's promulgation of the Pesticide Rule is not in accordance with law, this Court must apply the two-part *Chevron* test. First, the Court asks whether Congress directly addressed the issue at hand in the plain language or legislative history of the Clean Water Act. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Second, the Court asks whether the agency's interpretation is based on a permissible construction of the statute. *Id.* If the agency's action is either contrary to the plain language or legislative history or not a permissible construction of the statute, this Court shall set aside the agency's action. Here, the "Pesticide's Rule" fails both steps of *Chevron*, and accordingly, the Pesticide Rule should be struck down.

### A. EPA's adoption of the Pesticide Rule is contrary to the Clean Water Act's plain language and legislative history.

Under the CWA, "Any activity is subject to NPDES permit requirements when it 1) discharges, i.e. adds, 2) a pollutant 3) to navigable waters 4) from a point source." R. at 7. (citing *Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305,

308 (9th Cir. 1993)). There is no dispute that the pesticide application mechanisms are "point sources." Therefore, "the validity of the Pesticide Rule . . . turns on the question whether the definition of 'pollutant' under CWA §502(6) unambiguously includes the pesticides in question." R. at 11. "Pollutant" as defined by section 502(6) of the CWA includes, "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste." 33 U.S.C. § 1362(6) (2004). The district court correctly determined that bacteriological pesticides applied directly to water and chemical and bacteriological pesticides applied over or near water are "pollutants" within the plain language of the statute. The district court erred, however, in concluding that chemical pesticides applied directly to water were not "pollutants" within the plain language of the statute.

All pesticides that end up in Laconic Bay are "pollutants" under the CWA. Particularly, biological pesticides are "biological materials," and chemical pesticides, are "chemical wastes." EPA, however, takes the following position:

> First, such pesticides are not "chemical wastes." The term 'waste' ordinarily that which is 'eliminated or discarded as no longer useful or required after the completion of a process.' Pesticides applied consistent with relevant FIFRA requirements are not 'wastes' as that term is commonly defined . . . EPA also interprets the term 'biological materials' not to include biological pesticides applied consistent with relevant FIFRA requirements . . . Since biologically and chemically based pesticides applied consistent with relevant requirements adopted by EPA under FIFRA are both EPA-evaluated products, treating them differently under the Clean Water Act is not warranted.

Application of Pesticides to Waters of the United States in Compliance With FIFRA, 71 Fed. Reg. at 68,486 (quoting The New Oxford American Dictionary 1905 (Elizabeth J. Jewell & Frank Abate eds., 2001)). EPA's position is directly contrary to the plain language in the statute.

Chemical pesticides applied over or near water and directly to water are "chemical wastes," because after the chemicals serve their intended purpose of killing pests, they are wastes that either end up in water or remain in water. As the district court stated,

> non-aquatic pesticides that fall into water after being used to kill pests that are not present in water are within the dictionary definition of materials that are eliminated . . . as no longer useful. Neither EPA nor the industry plaintiffs argue that these non-aquatic pesticides serve any useful purpose once they hit the water. Accordingly, they fall within the common understanding of the term "chemical wastes" and under the unambiguous statutory language must be subject to the NPDES permitting requirements.

R. at 12-13 (internal quotations omitted); *see Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) (holding that an aquatic herbicide used to kill weeds and algae was a pollutant under the CWA); *League of Wilderness Defenders / Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) (holding that insecticides sprayed over national forests lands was a pollutant under the CWA).

Similarly chemical pesticides applied directly to water are chemical wastes, because residual chemicals remain in the water after the pesticide kills pests in water.

> Although it would seem absurd to conclude that a toxic chemical directly poured into water is not a pollutant, we need not decide that issue because we agree with the district court that the residual acrolein left in the water after its application qualifies as a chemical waste product and thus as a 'pollutant' under the CWA.

*Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532-533 (9th Cir. 2001). EPA acknowledges that residual pesticide chemicals that remain in water are pollutants within the definition of the CWA, but attempts to justify the Pesticide Rule by claiming that the pesticides, as originally applied, are not pollutants, because at the time of their discharge they are intended to kill pests. 71 Fed. Reg. at 68,487. EPA's argument is flawed, because the Clean Water Act does not exempt pollutants that first serve a beneficial purpose. *See U.S. Public Interest Research Group v. Heritage Salmon, Inc.*, 2002 WL 240440 (D. Me. 2002) ("[T]he classification of a substance as a 'pollutant' does not involve consideration of the intended use of the substance nor the reason for which it was released into the waters."); Sarah Slack, *When is a Pesticide Not a Pollutant? Never: An Analysis of the EPA's Misguided Guidance*, 90 Iowa L. Rev. 1241, 1266 (2005) ("the use of a pesticide for its intended purpose cannot negate the fact that the

pesticide is a pollutant under the CWA"). "[A] pollutant is a pollutant no matter how useful it once may have been." *Hudson River Fisherman's Ass'n v. City of New York*, 751 F.Supp 1088, 1101 (S.D.N.Y. 1990) (holding that chlorine residual, when discharged into navigable waters, was a "pollutant" within meaning of the Act, even though its intended use was beneficial.). Since EPA recognized that pesticides applied in certain instances are "pollutants" subject to the NPDES permit requirements of the CWA, EPA's position that a pesticide is not a pollutant if at the time of the pesticide's release it is not waste does not hold water, since every pesticide is released with the initial purpose to kill pests.

Biological pesticides that are applied over or near water and to water are biological materials and therefore, pollutants under the plain language of the CWA. "extension of this exemption [Pesticide Rule] to bacteriological pesticides runs afoul of the unambiguously expressed congressional intent to require permits for all 'biological materials' discharged into water, whether to not they constitute 'wastes.'" R. at 12. *See Nat'l Wildlife Fed'n v. Consumers Power Co.,* 862 F.2d 580, 583 (6th Cir.1988) (finding that live fish, dead fish and fish remains are pollutants under the CWA, since they are 'biological materials"); *U.S. Public Interest Research Group v. Atlantic Salmon*, 215 F. Supp. 2d 239 (D. Me. 2002) (finding that non-native salmon that are released into the bay are pollutants under the Clean Water Act, because they are "biological materials.").[4]

The legislative history of the Clean Water Act indicates Congress's intent to regulate pesticides. The Senate report specifically addresses the danger of pesticides as applied by nonpoint sources.

> One of the most significant aspects of this year's hearings on the pending legislation was the information presented on the degree to which nonpoint sources contribute to water pollution. Agricultural runoff, animal wastes, soil erosion, fertilizers, pesticides and other farm chemicals that are a part of runoff, construction runoff and siltation from mines and acid mine drainage are major contributors to the Nation's water pollution

4. Further evidence that Congress intended for pesticides to be regulated under the CWA, is the specific reference to pesticides in other sections of the CWA. Section 104 (l) of the CWA requires the, "[c]ollection and dissemination of scientific knowledge on effects and control of pesticides in water." 33 U.S.C. § 1254(l) (2000); *see* Slack, *supra* at 1265.

> problem. Little has been done to control this major source of pollution.

S. Rep. No. 92-414 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3705. Congress was clearly concerned with the affect that pesticides have on the integrity of the nation's waters. An interpretation of the CWA exempting the application of pesticides from point sources from the NPDES permitting requirements is contrary to Congress's expressed concern regarding the danger of pesticides. "Congress undoubtedly recognized the pollution problem caused by pesticides, and intended that their application would trigger the NPDES permitting requirements." Slack, *supra* at 1268.

### B. EPA's adoption of the Pesticide Rule constitutes an impermissible construction of the Clean Water Act.

The Court should find that Congress has spoken directly to the issue of whether pesticides are "pollutants" under the CWA. Even if the Court does not reach this conclusion, EPA's adoption of the Pesticide Rule fails the second step of *Chevron*, because it is an impermissible construction of the CWA. The Pesticide Rule removes certain applications of pesticides from the ambit of the Clean Water Act if the pesticides are properly registered with EPA under FIFRA. The EPA does not dispute that pesticides are "pollutants" under the Clean Water Act in other instances. Application of Pesticides to Waters of the United States in Compliance With FIFRA, 71 Fed. Reg. at 68,487. Therefore, EPA's determination that pesticides applied over or near water or directly to water in compliance with FIFRA are not "pollutants" under the CWA is only a pretext for using FIFRA to preempt the CWA with regard to the application of certain pesticides. Since Congress did not expressly mandate that pesticide regulation under FIFRA preempted pesticide regulation under the CWA, EPA's Pesticide Rule is an impermissible construction of the CWA. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ('When there are two acts upon the same subject, the rule is to give effect to both if possible . . . The intention of the legislature to repeal 'must be clear and manifest.'")

The Court in *Headwaters* put it best:

> The CWA and FIFRA have different, although complementary, purposes. The CWA's objective "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and to that end the statute requires a NPDES permit before any pollutant can be discharged into navigable waters from a point source. FIFRA's objective is to protect human health and the environment from harm from pesticides, and to that end the statute establishes a nationally uniform pesticide labeling system requiring the registration of all pesticides and herbicides sold in the United States and requiring users to comply with the national label. Even this cursory review of the statutes reveals that a FIFRA label and a NPDES permit serve different purposes. FIFRA establishes a nationally uniform labeling system to regulate pesticide use, but does not establish a system for granting permits for individual applications of herbicides. The CWA establishes national effluent standards to regulate the discharge of all pollutants into the waters of the United States, but also establishes a permit program that allows, under certain circumstances, individual discharges. FIFRA's labels are the same nationwide, and so the statute does not and cannot consider local environmental conditions. By contrast, the NPDES program under the CWA does just that.

*Headwaters*, 243 F.3d. at 531 (citations omitted).

## VI. The Failure Of The Pesticide Rule To Include Within Its Exemption Pesticide Residues, Pesticides Applied In Violation Of Fifra Requirements, And Pesticides Applied Distant From Water But Which Drift Into Water Is Not Arbitrary And Capricious, An Abuse Of Discretion, Or Otherwise Not In Accordance With The Law

The industry plaintiffs assert that EPA's failure to include within the Pesticide Rule pesticides applied in violation of FIFRA and pesticides applied distant from water, but which drift into water. As seen in Argument V of this Brief, the current Pesticide Rule is not in accordance with law, and any extension of the rule is likewise not in accordance with law. *See supra* pp. 26-33.

Even if the Court concludes that the Pesticide Rule is in accordance with law, EPA's declination to extend the rule is proper. It is a well established principle of Administrative Law, that inaction by an agency is afforded a high level of deference. Administrative agencies, "ha[ve] considerable discretion in responding to

requests to institute proceedings or to promulgate rules, even though it possesses the authority to do so should it see fit. Administrative rule making does not ordinarily comprehend any rights in private parties to compel an agency to institute such proceedings or promulgate rules." *Action for Children's Television v. FCC,* 564 F.2d 458, 479 (D.C. Cir. 1977) (internal quotations omitted). EPA's decision not to extend the Pesticide Rule constitutes agency inaction and is akin to EPA's decision not to promulgate a rule in the first place.

The standard for reviewing EPA's failure to extend the Pesticide Rule is extremely deferential and is "limited to ensuring that the agency has adequately explained the facts and policy concerns it relied on, and that the facts have some basis in the record." *National Ass'n of Regulatory Util. Comm'rs v. DOE,* 851 F.2d 1424, 1430 (D.C. Cir. 1988) (citation omitted). Thus, "[i]t is only in the rarest and most compelling of circumstances that th[e] court has acted to overturn an agency judgment not to institute rulemaking." *WWHT, Inc. v. FCC,* 656 F.2d 807, 818 (D.C. Cir. 1981). In its promulgation of the Pesticide Rule EPA responded to the industry plaintiffs' request that the rule be extended to include additional pesticide applications.

> EPA is continuing to consider the applicability of the CWA to situations other than those EPA is addressing in today's action where pesticides applied in accordance with relevant FIFRA requirements may reach and enter waters of the United States, including drift of pesticides applied aerially over land. Therefore, EPA does not believe it is appropriate to broaden the scope of the regulation to include additional types of pesticide applications at this time. To assist the Agency's consideration of these issues, EPA has established a workgroup under the existing Pesticide Program Dialogue Committee (PPDC) (an advisory committee chartered under the Federal Advisory Committee Act (FACA)) to address issues involving pesticide spray drift from agricultural and other applications.

Application of Pesticides to Waters of the United States in Compliance With FIFRA, 71 Fed. Reg. at 68,488. Since EPA has addressed the industry plaintiffs' request to extend the Pesticide Rule and stated in the record their reason for declining such an extension, their omission of certain pesticide application from the Pesticide Rule is appropriate.

## CONCLUSION

For the foregoing reasons, the environmental plaintiffs respectfully request that this court uphold the district court's partial grant of the environmental plaintiff's summary judgment and reverse the district court's partial denial of the environmental plaintiff's summary judgment.